STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 5, 2013
v	Nos. 306449 and 308963 Ingham Circuit Court
RANDALL KEVIN HENRY, Defendant-Appellant.	LC Nos. 10-001266-FC; 10-001265-FC

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

BOONSTRA, J. (*dissenting*).

I respectfully dissent from the majority's remand of this matter for further proceedings because I find such further proceedings to be unnecessary to resolve the issues before us.

The majority finds the current record inadequate to determine, as a preliminary issue, whether the entry of the police into Dorchester apartment 104 violated the Fourth Amendment. The majority identifies a series of questions that it finds unanswered in the current record, and remands to the trial court to determine whether the facts establish that, at the time police entered the apartment, they had probable cause and circumstances existed that established an exception to the warrant requirement.

While I appreciate the majority's desire for a complete record, and its discretion to remand for the trial court to supplement the record, MCR 7.216(A)(5) and (7), I find the exercise to be unnecessary here, given that the parties have effectively stipulated to the supplementation of the record with materials that I believe are sufficient to answer the questions identified by the majority. Specifically, defendant attaches the search warrant (as well as a portion of the affidavit accompanying the search warrant) to his Standard 4 brief on appeal, and the prosecution also attaches the search warrant, and the entirety of the affidavit, to its response to defendant's Standard 4 brief. While it is true that a party generally may not expand the record on appeal, *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999), both parties here have implicitly requested that we permit additions to the record, including specifically the search warrant and affidavit. Therefore, I would allow these documents to be included in the record in order to address and resolve defendant's Fourth Amendment challenge. See MCR 7.216(A)(4) (providing that the Court of Appeals may, "in its discretion, and on the terms it deems just . . . permit amendments, corrections, or additions to the transcript or record").

The police affidavit provides the factual context that the majority finds currently lacking in the record. It indicates that on the morning police entered the apartment, an individual took money from a local diner at approximately 11:45 a.m. and fled the scene. Specifically, while the suspect was paying his tab, when the cashier stepped away from the cash register, the suspect reached into the register, took money, and fled the scene in a tan Suburban. A patron of the diner saw the suspect and followed him to the Dorchester apartment complex. The patron saw the suspect walk into the apartment building but did not see which apartment the suspect entered. The patron called 911 and informed police of the situation. Sergeant Joe Brown of the Lansing Police Department was dispatched to the apartments at 11:54 a.m., approximately 9 minutes after the larceny occurred.

Sometime before the larceny at the diner, police received a tip that the person responsible for four robberies at the L&L Gas Express stayed at Dorchester apartment 104 or in vacant apartments at the complex. The affidavit indicates that, after receiving the call from the patron of the diner, officers responded to the Dorchester apartment complex and "in checking the area of apartment 104, they found a window was open and unsecure." Police knocked and announced their presence then entered the apartment to perform a "security check."

Brown testified at trial that he was on road patrol on December 5, 2010, at about 11:54 a.m. when he was dispatched to the Dorchester apartment complex to follow up on "an unrelated call looking for possible accused in another event." Brown testified that he responded directly to apartment 104. Brown explained that he was standing near a window to the right of the doorway of the apartment and he noticed "several marks which appeared to be pry marks" in the lower left corner of the window. The window was unsecured and Brown was concerned that someone had forced entry into the apartment. Brown testified that he and other officers made repeated verbal requests to anyone inside the apartment to "make themselves known and answer the door." When he did not receive a response, Brown and two other officers entered apartment 104. Brown explained:

> We were following up on an unrelated call looking for possible accused in another event, and we were concerned that with the pry marks, the open window, that's indicative of somebody breaking into a residence rather than using the key. We needed to check the welfare to make sure that there were no victims and to see if there were any suspects within the apartment.

When asked if he had "cause for concern that maybe something or somebody could be hurt or something of that effect inside the apartment," Brown, stated, "[p]ry marks, it was unsecured, looking for another subject, yes."[1] Upon entry, Brown found defendant and another man lying on a mattress in the back bedroom. Brown noticed currency between the mattress and the box springs falling onto the floor and he saw a black puffy coat on a couch. Brown testified that police did not conduct a search, but he had the other officers arrest and separate the two men and

[1] The majority notes that police incident reports (which are attached to defendant's Standard 4 brief but not a part of the record) do not specifically reference the pry marks to which Brown testified. However, I do not find the incident reports to "conflict" with Brown's testimony. It is quite conceivable that Brown observed the pry marks and that they contributed to his concerns, as he testified, without the pry marks specifically being referenced in the incident reports.

he stationed an officer at the door of the apartment until police could obtain a search warrant. Police eventually obtained a search warrant for the apartment based on the affidavit discussed above. When police executed the search warrant, they seized items that linked defendant to the charged offenses—in particular, police found several coats and a hat that matched the victims' description of what the perpetrator wore when he committed the robberies. The prosecution introduced the items into evidence at trial. Defendant contends that police violated his Fourth Amendment rights when they entered the apartment without a warrant.

"Generally, a search conducted without a warrant is unreasonable unless there exist[s] both probable cause and a circumstance establishing an exception to the warrant requirement." *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000) (internal quotation marks and citation omitted). "One of the exceptions to the Fourth Amendment warrant requirement is the so-called 'exigent circumstances' exception." *People v Cartwright*, 454 Mich 550, 558; 563 NW2d 208 (1997). "'Hot pursuit' is a form of 'exigent circumstances.'" *People v Raybon*, 125 Mich App 295, 301; 336 NW2d 782 (1983), citing *Warden v Hayden*, 387 US 294; 87 S Ct 1642; 18 L Ed 2d 782 (1967). "Under the hot pursuit exception, an officer may chase a suspect into a private home when the criminal has fled from a public place." *Smith v Stoneburner*, 716 F3d 926, 931 (CA 6, 2013), citing *Warden*, 387 US at 294. "Typically, hot pursuit involves a situation where a suspect commits a crime, flees and thereby exposes himself to the public, attempts to evade capture by entering a dwelling, and the emergency nature of the situation necessitates immediate police action to apprehend the suspect." *Cummings v City of Akron*, 418 F 3d 676, 686 (CA 6, 2005), citing *Warden*, 387 US at 298-299. Additionally, other exigent circumstances that may justify a warrantless entry into a residence include entry "to prevent the imminent destruction of evidence . . . and where there is risk of danger to police or others inside or outside a dwelling. . . ." *Cartwright*, 454 Mich at 558, citing *Minnesota v Olson*, 495 US 91; 110 S Ct 1684; 109 L Ed 2d 85 (1990).

Warden, 387 US at 294, is illustrative of the "hot pursuit" exception. In *Warden*, an armed robber stole money from a cab company and fled the scene. *Id*. at 297. Two cab drivers followed the man to a residence and relayed the information to dispatch, dispatchers then relayed the information to police. *Id*. Within minutes, police officers arrived at the residence, entered the residence without a warrant, arrested the suspected robber and seized evidence. *Id*. at 297-298. The United States Supreme Court held that the warrantless entry did not violate the Fourth Amendment as follows:

> [N]either the entry without warrant to search for the robber, nor the search for him without warrant was invalid. Under the circumstances of this case, 'the exigencies of the situation made that course imperative.' The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that

> Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape. [*Id*. at 298-299.]

In this case, like in *Warden*, police entry into the apartment fell within the "hot pursuit" exception to the warrant requirement. In particular, police were in pursuit of a felony suspect at the time they entered the apartment. The suspect fled the scene of the diner after patrons observed him commit a larceny in a building. Police were immediately dispatched to the apartment complex about nine minutes later when the patron telephoned police from the complex's parking lot. On arrival, police had reason to believe that the suspect entered apartment 104 and that an emergency necessitated their immediate action. *Cummings*, 418 F 3d at 686. Specifically, police observed pry marks on the apartment window and the window was open and unlocked. In addition, police had previously received a tip from an informant that a suspect of other recent robberies in the area was staying in apartment 104. Therefore, police had reason to believe that the larceny suspect was armed and dangerous such that they needed to enter the apartment to prevent the suspect's use of any weapons against them or to effect an escape or to prevent the destruction of evidence. See *Warden*, 387 US at 298-299; *Cartwright*, 454 Mich at 558. Specifically, police were aware that several armed robberies and larcenies had occurred in the area over the past several weeks including four armed robberies at the L&L Gas Express, which was located close to the apartment complex. During at least two of these robberies, the suspect used a firearm to commit the offenses. It was therefore reasonable for police to suspect that the perpetrator from the diner fled into apartment 104 and was potentially armed and dangerous such that the exigencies of the situation necessitated their immediate action. Here, like in *Warden*, speed was essential and only immediate entry into the apartment could insure that police prevented the suspect's escape, destruction of evidence, or use of deadly weapons against them. Moreover, upon entry, police made a limited sweep of the apartment to search for the suspect. After police secured the individuals inside the apartment, they did not conduct a search or seize any evidence. Instead, they secured the apartment and waited to search the apartment until they could obtain a warrant. In doing so, police limited their actions to address the perceived threat at the apartment, and then waited to secure a search warrant before continuing with their investigation. Police acted reasonably and their conduct fell within the hot pursuit exception to the warrant requirement such that introduction of the evidence obtained during the entry and subsequent search did not run afoul of the Fourth Amendment.

In addition to finding that there was no Fourth Amendment violation here, I would find that the admission at trial of evidence obtained as a result of the search warrant (which principally consisted of clothing items and scissors), even if it had been wrongful, would not have affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The evidence presented at trial—particularly the eyewitness identifications—overwhelmingly supported the verdict, even without the admission of defendant's statement[2] or the evidence recovered at the apartment. I would thus find that any error in the admission of the search warrant evidence (which I would find non-existent in any event) was harmless.

[2] Given the majority's remand of this matter and the retention of jurisdiction, I will defer discussion of why the admission of defendant's statement did not violate *Miranda v Arizona*, 384 US 436, 442-443, 446; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

For these reasons, I find the record that is before us adequate to decide the issues presented on appeal, and I therefore respectfully dissent from the majority's decision to remand this matter for further proceedings.

/s/ Mark T. Boonstra